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IN THE

Supreme Court of the United States

October Term, 1984

TURNER ADVERTISING COMPANY,

Petitioner,

V.

FRANCIS REES GARCIA, n/k/a
EMILY FRANCES REES, and
EMILY WALSH CARNES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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27PP

QUESTION PRESENTED

1. Whether it is violation of the right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States to find a party in contempt of a court order when it is not within the party's power to comply with the order?

PARTIES INVOLVED

Turner Advertising Company

Frances Rees Garcia, n/k/a Emily Frances Rees

Emily Walsh Carnes

Guy W. Rutland III, Trustee for the

M-C Profit Sharing Plan

Chris V. Brigman

Robert W. Hughes

Pursuant to Rule 19.6 of the Rules of the Supreme Court of the United States, Turner Advertising Company states that Robert W. Hughes, Chris V. Brigman and Guy W. Rutland, III, Trustee for the M-C Profit Sharing Plan, have no interest in the outcome of this petition.

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IN THE

Supreme Court of the United States

October Term, 1984

TURNER ADVERTISING COMPANY,

Petitioner,

v.

FRANCIS REES GARCIA, n/k/a
EMILY FRANCES REES, and
EMILY WALSH CARNES,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Turner Advertising Company, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above entitled case on January 31, 1984 with a timely motion for rehearing denied on February 15, 1984.

OPINIONS BELOW

The judgment of the Supreme Court of Georgia was entered on January 31, 1984. A timely motion for rehearing was filed and denied on February 15, 1984. The text of the opinion of the Supreme Court of Georgia, the order on the motion for rehearing issued by that court together with the relevant order of the Superior Court of Gwinnett County, Georgia are contained in the Appendix. The opinion of the Supreme Court of Georgia sought to be reviewed is reported at 252 Ga. 101, ___ S.E.2d ___ (1984).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1257(3) (1976) to review, by writ of certiorari, the judgment of the Supreme Court of Georgia in the case of *Turner Advertising Company v. Garcia*, 252 Ga. 101, ___ S.E.2d ___ (1984) entered on January 31, 1984. A timely motion for rehearing filed by Petitioner was denied on February 15, 1984. This peition is being filed within ninety (90) days from the date on which the motion for rehearing was denied. 28 U.S.C. §2101(c) (1976).

The Supreme Court of Georgia affirmed an adjudication of contempt by a Georgia trial court although it was not within the Petitioner's power to comply with the trial court's order. The judgment of the Supreme Court of Georgia, the highest court of the State of Georgia, deprives Petitioner of its Fifth Amendment right to due process of law made applicable to the State of Georgia through the Fourteenth Amendment to the United States Constitution. This Court has consistently held that a writ of certiorari should be granted where the effect of a judgment of the highest court in a state deprives a party of its constitutional rights. 28 U.S.C. §1257(3) (1976); *See e.g., Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601 (1968); *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U.S. 679, 43 S.Ct. 675 (1923).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment: United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor shall he be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment to the Constitution of the United States is made applicable to the State of Georgia via the Fourteenth Amendment to the United States Constitution. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. (1925).

2. Fourteenth Amendment: Section 1: United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Turner Advertising Company is the Petitioner in this action. Petitioner was an outdoor billboard advertising company which customarily entered into ground leases with property owners for the erection and maintenance of its outdoor advertising signs. The petition for writ of certiorari seeks the review of a judgment of the Supreme Court of Georgia affirming a Georgia trial court's order finding Petitioner in contempt of its order enjoining the continued maintenance of an outdoor advertising sign.

On or about January 8, 1982, Chris V. Brigman, Guy Rutland, III, as trustee for the M-C Profit Sharing Plan, and Robert W. Hughes ("Landowners") entered into a ground lease with Petitioner permitting it to erect an outdoor advertising sign on commercial property owned by them in Gwinnett County, Georgia. Before entering into the lease, Petitioner inquired of the Landowners as to whether their property was subject to any restrictive covenants which precluded the erection and/or maintenance of outdoor advertising signs. The Landowners represented to Petitioner that there were no restrictive covenants prohibiting outdoor advertising signs and that they had full authority to enter into the ground lease. A five (5) year ground lease was signed and Petitioner proceeded to obtain all necessary governmental permits for construction of the sign. On June 1, 1982 Petitioner began construction of the outdoor advertising sign. The sign was completed on June 25, 1982.

On July 6, 1982, the owners of the property adjoining that on which the sign was erected, the Respondents herein, filed suit to enjoin the erection and maintenance of the sign and also for damages and attorney's fees. In their suit, the Respondents contended that there was a recorded document entitled "Declaration of Covenants, Conditions and Restrictions" ("Declaration") and an unrecorded document entitled "Peachtree Corners Design Guidelines" ("Guidelines") which required the submission to and approval of the architectural control committee of Peachtree Corners Inc. ("Committee") before an outdoor advertising sign could be erected. Petitioner answered the suit denying all of the allegations against it and demanded a trial by jury as to all issues. On August 12, 1982, the trial court conducted a hearing and on September 9, 1982 issued a preliminary injunction enjoining Petitioner and the Landowners from making any further improvements or additions to the sign.

On November 23, 1982 the trial court conducted a trial on the Respondents' complaint for a permanent injunction. At the conclusion of the evidence, the trial court reserved ruling. On January 11, 1983, the trial court entered an order permanently restraining and enjoining Petitioner and the Landowners from the continued maintenance of the outdoor advertising sign. That order was stayed by the trial court on January 17, 1983 pending Petitioner's appeal to the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the judgment of the trial court in *Turner Advertising Company v. Garcia,* 251 Ga. 46, 303 S.E.2d 547 (1983).

While that appeal was pending, Respondents conveyed their interest in the adjoining property to third parties by a warranty deed dated and recorded on January 17, 1983. Respondents no longer owned the adjoining property after that date and the issues in their case became moot.

Because Respondents no longer had any direct relationship with the case, Petitioner did not remove the advertising sign after the remittitur from the Supreme Court of Georgia was returned to the trial court. Although they no longer owned the adjoining property, the Respondents filed a motion on July 12, 1983 requesting the trial court to find Petitioner and the Landowners in contempt of its January 11, 1983 order because the sign had not been removed.

On July 19, 1983 Petitioner filed a motion to vacate the trial court's January 11, 1983 injunction order and to dismiss Respondents' case on the grounds that the Respondents no longer owned the property, had no continuing stake in the controversy and that the issues involved in their case were moot. In response to the Respondents' motion for contempt, Petitioner stated that it no longer owned the outdoor advertising sign which was the subject matter of the action and had no authority or ability to control its disposition. Because it was not able to comply with the trial court's January 11, 1983 injunction order, Petitioner asserted that it could not be held in contempt of the order.

A hearing was held on these motions on August 11, 1983. In an order dated August 26, 1983 the trial court denied Petitioner's motion to vacate the January 11, 1983 permanent injunction and dismiss the Respondents' complaint. Instead, the trial court found only Petitioner in contempt of its January 11, 1983 injunction order. (Appendix A7-A9). The trial court subsequently stayed its contempt order on September 6, 1983 to permit Petitioner to appeal to the Supreme Court of Georgia.

As one of its enumeration of errors on appeal, Petitioner contended that the trial court erred in holding it in contempt since at the time the contempt order was entered, Petitioner did not have the power to comply with the trial court's injunction order. In its opinion, the Supreme Court of Georgia rejected this argument and affirmed the adjudication of contempt by the trial court. The Supreme Court of Georgia completely overlooked the undisputed evidence that when the order for contempt was entered Petitioner no longer owned the sign and did not have the ability to comply with the trial court's January 11, 1983 injunction order. (Appendix A2-A4). Petitioner timely moved for a rehearing of the opinion of the Supreme Court of Georgia which was denied. (Appendix A5).

Petitioner asserted the issue it raises in this petition for writ of certiorari both in the trial court and in the Supreme Court of Georgia. In both instances, Petitioner's arguments were disregarded. Since the question involved in this petition for writ of certiorari was timely raised in the state courts, it may now be considered by this Court. This Court should grant Petitioner's Petition for Writ of Certiorari to vindicate Petitioner's constitutional right to due process of law.

REASONS WHY WRIT OF CERTIORARI SHOULD ISSUE

A. BECAUSE PETITIONER DID NOT HAVE THE ABILITY TO COMPLY WITH THE ORDER FOR WHICH IT WAS HELD IN CONTEMPT, THE AFFIRMANCE OF THE TRIAL COURT'S CITATION FOR CONTEMPT BY THE SUPREME COURT OF GEORGIA DEPRIVES PETITIONER OF ITS RIGHT TO DUE PROCESS OF LAW.

In its opinion, the Supreme Court of Georgia acknowledged that Petitioner did not own the outdoor advertising sign which was the subject matter of this action when the contempt order was entered and could not comply with the trial court's injunction. Nevertheless, the Supreme Court of Georgia affirmed the trial court's order for contempt. Petitioner respectfully submits that in light of the fact that it could not purge itself of the contempt found by the trial court, the judgment of the Supreme Court of Georgia has the effect of depriving Petitioner of its right to due process of law.

A civil contempt sanction is a coercive device imposed to secure compliance with a court order. *Shillitani v. United States,* 384 U.S. 364, 86 S. Ct. 1531 (1966); *Maggio v. Zeitz,* 333 U.S. 56, 68 S. Ct. 401 (1948). When it becomes obvious that a citation or sanction for

contempt is not going to coerce compliance with a court order, the citation for contempt and the sanctions imposed lose their remedial characteristics and more closely resemble some form of punishment. *Simkin v. United States,* 715 F.2d 34, 37 (2d Cir. 1983); *Soobzokov v. CBS, Inc.,* 642 F.2d 28, 31 (2d Cir. 1981). However, a citation for civil contempt cannot be penal in nature. *Florida Steel Corp. v. N.L.R.B.,* 648 F.2d 233 (5th Cir. 1981). Once it is beyond a person's power to comply with a civil contempt order, the contempt citation and any sanctions imposed as a result should be withdrawn because they become penal; to do otherwise serves only to unconstitutionally deprive a person of its right to due process of law. *In re Grand Jury Investigation,* 600 F.2d 402, 423 (3rd Cir. 1979); *Lambert v. State of Montana,* 545 F.2d 87 (9th Cir. 1976).

In *Lambert v. State of Montana, supra,* the court considered the effect which the duration of confinement resulting from a state court's finding of civil contempt may have upon a party's right to due process of law. The case involved the refusal of a witness, who had been granted immunity from prosecution, to subsequently testify for the state. The witness was found in contempt for refusing to testify and was committed to jail until he elected to testify. The holding of the court was as follows:

> We conclude there may exist substantial likelihood that petitioner's confinement is no longer coercive, but may now be punitive. If this is true, his continued confinement denies him due process and he should be released, since, to be constitutional, his confinement must bear some reasonable relationship to the purpose for which he was committed. 545 545 F.2d at 91.

Likewise, *In re Grand Jury Investigation, supra,* the Third Circuit Court of Appeals considered whether a contempt sanction, in the form of incarceration, imposed for a witness' failure to testify violated the due process rights of the recalcitrant witness when it appeared that there was no substantial likelihood that he would ever testify. After noting that civil contempt is primarily coercive in nature and designed to benefit a party that has complained to the court about the contemnor's recalcitrance, the court held:

> ...[W]hen the confinement has lost its coercive force and consequently no longer bears a reasonable relationship to the purpose for which the contemnor was committed, due process requires that he be released. 600 F.2d at 424-25.

Sigety v. Abrams, 632 F.2d 969 (2d Cir. 1980); *e.g. Catena v. Sceidl,* 65 N.J. 256, 321, A.2d 225 (1974); *cf., In re Brookins,* 153 Ga. App. 82, 246 S.E.2d. 560 (1980). (In *Brookins,* the court held that it is essential to constitute a contempt that the thing ordered to be done be within the power of the person against whom the order is directed.).

In this case, the Supreme Court of Georgia specifically acknowledged that at the time the order for contempt was entered, the Petitioner no longer owned the advertising sign involved in the action and was unable to comply with the injunction order. Rather than recognizing that a citation for contempt would be totally inappropriate in this case because it would have no coercive effect upon the Petitioner, the Supreme Court of Georgia affirmed the judgment of the trial court on the grounds that it was Petitioner's own conduct which precluded it from being able to comply with the trial court's injunction. The intent of the Supreme Court of Georgia was not to coerce obedience to an order of the Georgia trial court, but to improperly impose a penal sanction upon the Petitioner.

Despite Petitioner's inability to comply with the trial court's order, it was held in contempt and is subject to sanctions including possible imprisonment and imposition of monetary penalties. The effect of the judgment of the Supreme Court of Georgia is to deprive Petitioner of its constitutional right to due process of law and is therefore violative of the Fifth Amendment to the Constitution of the United States made applicable to the State of Georgia via the Fourteenth Amendment to the Constitution of the United States. *Gitlow v. New York, supra.*

B. THE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW REQUIRES THIS COURT TO GRANT A WRIT OF CERTIORARI.

The purpose of a writ of certiorari is to enable a party whose constitutional rights have been violated by the judgment of a state's highest court to have that judgment reviewed by this Court. *Howell v. Jones,* 516 F.2d 53, *reh. denied,* 521 F.2d 815 (5th Cir.), *cert. denied,* 424 U.S. 916, 96 S.Ct. 1116, *reh. denied,* 425 U.S. 945, 96 S.Ct. 1687 (1975). A writ of certiorari is appropriate in cases in which the decision of the highest court of the state as to a constitutional issue is in conflict with those of the federal courts. *Missouri Pacific Railway Company v. Elmore & Stahl,* 377 U.S. 134, 84 S.Ct. 1142 (1964). Even if the highest court of a state did not directly address a constitutional issue in its opinion, but the effect of its

judgment violates a party's constitutional rights, then this Court has jurisdiction by writ of certiorari to review the state court's judgment. *Anonymous Nos. 6 and 7 v. Baker,* 360 U.S. 287, 79 S.Ct. 1157 (1959). A petition for writ of certiorari is not barred even if the constitutional issue was not specifically raised in the state court, if the effect of the state court's judgment unexpectedly gives rise to a federal question which the party seeking review has had no previous opportunity to assert and did not anticipate. *Chambers v. Mississippi, supra; See also, Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 50 S.Ct. 451 (1930); *Missouri, ex rel., Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 50 S.Ct. 326 (1930).

The case at bar presents one for which a writ of certiorari should be granted. The judgment of the Supreme Court of Georgia affirmed the trial court's order holding Petitioner in contempt. At the time the contempt order was entered, the trial court was aware that the Petitioner did not have the power to comply with its order. The Petitioner appealed the trial court's citation for contempt. In its own opinion, the Supreme Court of Georgia acknowledged that Petitioner could not comply with the trial court's previous order and wrote "Ordinarily, one charged with contempt for failure to comply with a court order makes a complete defense by proving that he is unable to comply..." (Appendix A4). Despite this fact, the Supreme Court of Georgia affirmed the trial court's order for contempt.

Since Petitioner cannot comply with the trial court's order for contempt, it is now subject to sanctions in the form of a deprivation of liberty and property. This Court must review the decision of the Supreme Court of Georgia to vindicate the Petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

There is another reason which justifies granting a writ of certiorari in this case. The judgment of the Supreme Court of Georgia conflicts with numerous federal cases which have held that when an order holding a party in civil contempt loses its coercive effect, it violates the principles of due process of law to continue holding the party in contempt. In the case at bar, the trial court's contempt order can have no coercive effect upon Petitioner because it is not within its power to comply with the order. It is clear from a reading of the Supreme Court of Georgia's opinion that its affirmance of the trial court's order of contempt is meant to be punitive. The Supreme Court of Georgia wrote:

> The evidence that the defendant, Turner Advertising Company, conveyed its interest in the sign after the plaintiffs' filed their motion for contempt, constitutes no defense to the contempt proceeding, and indicated the defendant's responsibility for its inability to comply with the injunction order. (Appendix A4).

The judgment of the Supreme Court of Georgia conflicts with the holdings in *In Re Grand Jury Investigation, supra,* and in *Lambert v. State of Montana, supra.* As the judgment of the Supreme Court of Georgia conflicts with these cases in the federal system, this Court should grant Petitioner's Petition for Writ of Certiorari to review this judgment.

CONCLUSION

This Court has jurisdiction to grant Petitioner's Petition for Writ of Certiorari pursuant to 28 U.S.C. §1257(3) (1976). The issues raised by this Petition for Writ of Certiorari involve the deprivation of Petitioner's constitutional right to due process of law and are sufficiently important to warrant consideration by this Court.

Respectfully submitted,

/s/

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APPENDIX

In the Supreme Court of Georgia

Decided: January 31, 1984

No. 40510.

TURNER ADVERTISING COMPANY

v.

GARCIA et al.

MARSHALL, Presiding Justice.

The appellees-plaintiffs obtained an injunction ordering the appellant and other defendants to remove from the defendants' property within 10 days, an outdoor advertising sign which was in violation of certain restrictive covenants. See *Turner Advertising Co. v. Garcia,* 251 Ga. 46 (302 SE2d 547) (1983).

The plaintiffs subsequently filed a motion for contempt, alleging that the defendants had failed to remove the sign, and the defendants moved to vacate the injunction. There was evidence at the hearing on these motions that defendant-appelant Turner Advertising Co. — after the motion for contempt was filed, after filing its motion to vacate the injunction, and prior to the hearing on the parties' motions — had sold all of its interest in the sign to Turner Outdoor Advertising, Ltd., an Alabama limited partnership; and that the two plaintiffs had conveyed the property which they owned adjacent to the defendants' property by warranty deed in fee simple, four days after the injunction order was entered. The trial court's recitation of facts stated that the plaintiffs had been allowed, over objection, to introduce in evidence a certified copy of the recorded purchase money security deed which the plaintiffs (plural) took back from the purchasers of the real estate; however, the copy referred to does not appear in the record before us. One of the trial court's findings of fact was that plaintiff Carnes had taken back (on an unspecified date) a security deed covering the property conveyed by the plaintiffs.

The trial court found defendant-appellant in contempt, and gave it 30 days within which to purge itself of contempt by removing the offending sign.

1. To maintain an action to enforce restrictive covenants, an individual must be the owner of, or have a direct interest in, the premises. Pindar, Ga. Real Est. Law, § 19-197 (2d Ed.), p 738; 56 ALR3d 556, 586-587; 20 AmJur2d 853, Covenants, § 288; Restatement, Property, §§ 549-550. Whereas the grantor of a security deed has only the right of possession and the equity of redemption, the grantee of a security deed holds legal title to the land and all the privileges of ownership except possession, until the debt is paid. OCGA § 44-14-60; *Todd v. Morgan,* 215 Ga. 220, 222 (2) (109 SE2d 803) (1959); *C. & S. Bank v. Realty Sav. &c. Co.,* 167 Ga. 170, 171 (1) (144 SE 893) (1928); Pindar, supra, §§ 21-39, 40. The interest in the land of a grantee of a security deed is sufficient in order to maintain an action for ejectment against anyone other than the grantor, and against the grantor if in default. *Todd v. Morgan,* supra, (2); *Marshall v. Carter,* 143 Ga. 526 (3) (85 SE 691) (1915).

Just as the grantee in the security deed has standing to maintain an action for ejectment against an outsider, we hold that the grantee has standing to enforce the restrictive covenants against an outsider, both actions being against the intrusions of an outsider, with only the nature of the intrusion being different. Nor need such grantee show actual benefit or injury to himself. " 'To warrant relief by injuction in the case of a covenant restricting erections upon the premises conveyed, it is not essential that the plaintiff should show any actual damage resulting from the breach of covenant of which he complains; and if a clear breach be shown, equity may interpose its preventive aid regardless of the question of damages, since the covenantee is entitled to the benefit of his covenant'... 'Equity will interfere by injunction to prevent the breach of an express, negative covenant, even though no substantial injury is caused by such breach...' " *Smith v. Pindar Real Estate Co.,* 187 Ga. 229, 335 (1) (200 SE 131) (1938).

The case of *Federal Land Bank v. St. Clair Lumber Co.*, 58 Ga. App. 532 (199 SE 337) (1938), cited by the appellant, is not authority to the contrary. That case held that the grantee in a security deed had to show that his security was being impaired in order to recover for timber cut from the land under timber rights sold by the grantor to another, who sold the cut timber to the defendant. That case did not involve restrictive covenants, and its rationale does not apply here. In any event, the rationale of that case was rejected the following year by the enactment of Code Ann. § 105-1412 (Ga. L. 1939, p. 340), now OCGA § 51-12-51, which gave the grantee in a security deed a claim against a third party for unauthorized timber cutting.

2. Ordinarily, one charged with contempt for failure to comply with a court order makes a complete defense by proving that he is unable to comply; however, the defendant's own acts cannot be responsible for his inability to comply. Fed. Trade Comm. v. Blaine, 308 FSupp. 932, 933-934 (4, 5) (N.D. Ga. 1970) and cits. The evidence that the defendant Turner Advertising Co. conveyed its interest in the sign after the plaintiffs filed their motion for contempt, constituted no defense to the contempt proceeding, and indicated the defendant's responsibility for its inability to comply with the injunction order.

Judgment affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

Atlanta, February 15, 1984

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

TURNER ADVERTISING COMPANY

V.

FRANCES REES GARCIA, n/k/a

EMILY FRANCES REES, ET AL.

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

SUPREME COURT OF GEORGIA

Atlanta, February 21, 1984

The Honorable Supreme Court met pursuant to adjournment.

By Marshall, P. J.

The following direction was given:

TURNER ADVERTISING COMPANY

v.

FRANCES REES GARCIA, n/k/a

EMILY FRANCES REES, et al.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on Feb. 15, 1984, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

/s/

Thomas O. Marshall

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/

Hazel E. Haleford, Deputy Clerk.

IN THE SUPERIOR COURT FOR THE

COUNTY OF GWINNETT

STATE OF GEORGIA

FRANCES REES GARCIA, n/k/a
EMILY FRANCES REES, and
EMILY WALSH CARNES,
Plaintiffs

VS.

GUY W. RUTLAND, III,
Trustee for the M-C
Profit Sharing Plan,
CHRIS V. BRIGMAN,
ROBERT W. HUGHES, and
TURNER ADVERTISING COMPANY
Defendants

CIVIL ACTION FILE NO. 82-A-1683

ORDER

On July 6, 1982, Plaintiffs filed this action seeking to enjoin and restrain the Defendants from maintaining a sign on Defendants' property, alleging that the maintenance of such sign was in violation of certain restrictive covenants. This Court entered an order on January 11, 1983, concluding that the Defendants had breached the above-mentioned restrictive covenants by erecting the sign. The Defendants were restrained and enjoined from continuing to maintain the sign and the Defendants were further ordered to remove the sign within ten days from the date of that order. That judgment was affirmed by the Supreme Court of Georgia in Case No. 39664 and No. 39748 on May 11, 1983. The judgment of the Supreme Court of Georgia was made the judgment of this Court on June 10, 1983.

On June 12, 1983, Plaintiffs filed a motion for contempt alleging that the Defendants had failed to abide by the Court's order of January 11, 1983, by failing to remove the sign.

The Plaintiffs filed no affidavits in support of their motion. On July 19, 1983, the Defendant, Turner Advertising Company filed a motion to vacate the injunction of January 13, 1983, on the grounds that the Plaintiffs no longer have a stake in the outcome of the controversy, having sold the real estate that adjoins the real property of the Defendants, Rutland, Brigman and Hughes. The Defendant, Turner Advertising Company, filed an affidavit of Marvin R. Sibley on August 10, 1983, the date of the hearing. That affidavit states that it is filed in support of Turner's motion to dismiss and in opposition to Plaintiff's motion for contempt. It further states that on August 1, 1983, Turner Advertising Company sold all of its interest in the billboard, which is the subject matter of this lawsuit, to Turner Outdoor Advertising, Ltd., an Alabama limited partnership. The affidavit of Marvin R. Sibley contains no statement regarding Plaintiff's ownership of its real property. No affidavits were filed by the Plaintiffs in opposition to Defendant Turner Advertising Company's motion to vacate.

Plaintiffs' motion for contempt and Defendant Turner Advertising Company's motion to vacate were heard by this Court on August 10, 1983. Defendant Turner Advertising Company introduced no evidence regarding Plaintiffs' ownership of its real property. Plaintiffs' attorney, however, stated to the Court that the Plaintiffs had in fact sold their real property adjacent to the Defendant's property on January 15, 1983. The Court allowed the plaintiffs, over objection, to introduce into evidence a certified copy of the recorded purchase money security deed which Plaintiffs took back from the purchasers of the real estate.

FINDINGS OF FACT

1. The outdoor advertising sign, which is the subject matter of this lawsuit, has not been removed from the property of the Defendants.

2. The Defendant Turner Advertising Company sold all of its interest in the aforementioned outdoor advertising sign on August 1, 1983, to Turner Outdoor Advertising, Ltd.

3. The Plaintiffs conveyed the property which they owned adjacent to the Defendants' property by warranty deed in fee simple on January 15, 1983. One of the Plaintiffs, Emily Walsh Carnes, took back a security deed covering the same property.

CONCLUSIONS OF LAW

1. Grantee in a deed to secure debt holds legal title to the property therein described and as the holder of legal title may maintain an action to enforce protective covenants. *Marshall vs. Carter,* 143 Ga. 526; *Todd vs. Morgan,* 215 Ga. 220. The motion to dismiss by the Defendant Turner Advertising Company is, therefore, denied.

2. Ordinarily, one charged with contempt for failure to comply with the Court's order makes a complete defense by proving that he is unable to comply. However, the Defendants' own acts cannot be responsible for his inability to comply. *Federal Trade Commission vs. Blaine,* 308 Fed. Sup. 932. The evidence shows that the Defendant Turner Advertising Company conveyed its interest in the outdoor advertising sign after the Plaintiffs filed their motion for contempt.

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant Turner Advertising Company is in contempt of the order of this Court dated January 11, 1983. In order to purge itself of said contempt, the Defendant Turner Advertising Company shall have 30 days from the date of this order to remove the outdoor advertising sign from the property of the Defendants.

SO ORDERED, this 26th day of August, 1983.

/s/

JAMES A. HENDERSON, Judge
Gwinnett Superior Court

CERTIFICATE OF SERVICE

This is to certify that I this day served counsel for the opposing parties in the following matter pursuant to Rule 28 of the Rules of the Supreme Court of the United States, with three copies each of "Petition for Writ of Certiorari" by delivering them in the United States Mail in a properly addressed envelope to:

Winship Rees, Esq.
246 Pike Street
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Attorney for Respondents

and

Tyler Dixon, Esq.
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Attorney for Chris V. Brigman,
Robert W. Hughes and Guy W. Rutland, III,
Trustee for M-C Profit Sharing Plan

with sufficient postage to assure delivery.

This the 14th day of May, 1984.

/s/

DAVID H. FLINT
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Supreme Court, U.S.
FILED
JUN 15 1984
ALEXANDER L. STEVAS
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83-1876

No. [redacted]

In The
Supreme Court of the United States
October Term, 1983

TURNER ADVERTISING COMPANY,

Petitioner,

vs.

FRANCES REES GARCIA, n/k/a
EMILY FRANCES REES, and
EMILY WALSH CARNES,

Respondents.

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a violation of the right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States to find a party in contempt of a court order but not impose a sanction

(i) when the party does not complain at trial or on appeal that it is a constitutional violation;

(ii) when the party alleges, but does not prove, that it is unable to comply with the court order;

(iii) when the party voluntarily created the alleged inability to comply with the court order; and,

(iv) when the party is in fact able to comply with the court order.

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No. 83-1826

In The
Supreme Court of the United States
October Term, 1983

TURNER ADVERTISING COMPANY,

Petitioner,

vs.

FRANCES REES GARCIA, n/k/a
EMILY FRANCES REES, and
EMILY WALSH CARNES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents submit the following as the material facts.

On January 11th, 1983, the Trial Court entered an order permanently restraining and enjoining Petitioners,

owners of an outdoor advertising sign, and the owners of the property upon which the sign was erected, from continuing the presence of the sign on the property which was adjacent to property of the Respondents.

On January 17th, 1983, Respondents recorded a Warranty Deed and a purchase money Deed to Secure Debt by which they conveyed their adjoining property to an uninvolved third party and took the property back as security for the purchase price.

On May 11th, 1983, the Supreme Court of Georgia affirmed the grant of the permanent injunction, and on June 1st, 1983, denied a re-hearing.

On July 12th, 1983, Respondents filed a motion to find the Petitioner and the land owners in contempt because the sign had not been removed.

On July 19th, 1983, Petitioner filed a motion to vacate the injunction contending the Respondents did not have sufficient interest in the property to maintain the injunction.

On August 1st, 1983, Petitioner transferred the sign to Turner Outdoor Advertising, Ltd.

On August 10th, 1983, at the hearing on the motion for contempt and to vacate, the Petitioner informed the Court and the Respondents for the first time of the August 1st, 1983, transfer of the sign.

On August 26th, 1983, the Trial Court denied the motion to vacate of the Petitioner and found the Petitioner in contempt for failure to remove the sign.

On January 31st, 1984, the Supreme Court of Georgia affirmed the denial of the motion to vacate and the find-

ing of contempt by the Trial Court and on February 15th, 1984, denied a re-hearing.

In its Brief to the Supreme Court of Georgia, the Petitioner stated the issue it asserts here as follows:

> "Can a party which does not have the ability to comply with a court order be held in contempt of the Order? (Enumeration of Error 2)."

The Petitioner never raised or argued any constitutional grounds for this issue. The petition for a writ of certiorari was the first time a due process violation was raised.

———o———

SUMMARY OF ARGUMENT

The petition for the writ of certiorari should be denied because

1. The Petitioner did not raise the constitutional issue of violation of due process in the Trial Court or in the Supreme Court of Georgia.

2. The Petitioner voluntarily created its alleged inability to comply with the court order.

3. The Petitioner failed to carry its burden of proving that it was unable to comply with the court order and that the finding of contempt was penal.

4. The Petitioner is able to comply with the court order.

———o———

ARGUMENT

1. The Petitioner did not raise the constitutional issue of violation of due process in the Trial Court or in the Supreme Court of Georgia.

The statement of the legal issue made by the Petitioner in its appeal to the Supreme Court of Georgia is set forth in the statement of the case and their entire legal argument to the Supreme Court of Georgia is set forth at App. 1. Petitioner never raised at trial the constitutional issues it asserts in this petition.

2. If the Petitioner is unable to comply with the order of the Trial Court, the inability was voluntarily created by the Petitioner.

> " . . . where an alleged contemnor has voluntarily and contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt." 17 Am Jur 2d, Contempt § 51, p.53, accord 17 CJS Contempt § 19, p.48-49.

In *McPhaul v. United States,* 364 US 372, 378[2]; 5 LEd 2d 136, 142; 81 SCt 138, reh den, 364 US 925, 5 LEd 2d 264, 81 SCt 282 (1960), this Court stated

> "A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability . . ." Citing *Jurney v. MacCracken,* 294 U.S. 125, 79 LEd 802 (1935).

The *Jurney* case, *supra,* is the same case that *Fed. Trade Comm. v. Blane,* 308 F.Supp. 932, 933-934[4] [5] (N.D.Ga. 1970) is based upon, which is the case cited by the trial court and the Supreme Court of Georgia in finding the Petitioner in contempt.

If Petitioner can voluntarily induce inability to comply and escape contempt, then enforcement of an injunction becomes a game of hide and seek.

> "Suits would be interminable, if the right of parties could be disturbed by mesne conveyances, and a necessity imposed for the introduction of other parties upon the record." *Secombe v. Steele,* 61 US 94, 105; 15 LEd 833, 837 (1858).

3. The Petitioner had the burden of proving that it was unable to comply with the order of the Trial Court, and the Petitioner failed to carry this burden.

> "A person who seeks to satisfy the court that his failure to obey an order or decree was due entirely to his inability to render obedience, without fault on his part, must prove such inability. In other words, the burden of proving inability to comply with the order allegedly violated is on the alleged contemnor." 17 Am Jur 2d, Contempt § 51, p.54.

This Court also places the burden on the Petitioner to prove his inability to comply. *McPhaul, supra,* 364 US p.379[4], 5 LEd 2d p.142.

The only evidence submitted by the Petitioner that it was unable to comply with the order of the Trial Court was an affidavit that stated the conclusion that the Petitioner could not comply.

Further, the Petitioner contends that the finding of contempt was penal, but it is the burden of the Petitioner to show that it was penal. *In re Grand Jury Investigation, Appeal of Braun,* 600 F.2d 420[7] (1979); *Lambert v. State of Montana,* 545 F.2d 87, 90[4.5] (1976). The Petitioner made no showing that the finding of contempt was penal, and it is difficult to imagine how merely being

found in contempt without the imposition of any sanctions could be penal.

4. The Petitioner is able to comply with the order of this Court.

O.C.G.A. § 23-1-18 states

> " . . . a pending action shall be a general notice of an equity or claim to all the world from the time the action is filed and docketed. If the same is duly prosecuted and is not collusive, one who purchases pending the final outcome of the litigation shall be affected by the decree rendered therein."

The purchaser of the sign took subject to the decree in this case. The Petitioner must now remove this sign. This may involve a question of damages for breach of contract between the purchaser and the Petitioner, but that does not prevent Petitioner from removing the sign.

CONCLUSION

Respondent is entitled to have the Petition for the Writ of Certiorari denied.

Respectfully submitted, this the 13th day of June, 1984.

/s/ Winship E. Rees
Attorney for Respondents

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APPENDIX

B. THE COURT ERRED IN FINDING TURNER IN CONTEMPT

The uncontradicted evidence was that Turner no longer owned the outdoor advertising sign involved in this action when Appellees' motion for contempt was heard. Nevertheless, the trial court found Turner in contempt of its January 11, 1983 order (R3d-67). This ruling was erroneous and contrary to the law of this State.

"It is essential to constitute a contempt that the thing ordered to be done be within the power of the person against whom the order is directed." *In re Brookins,* 153 Ga. App. 82 (1980). The inability to comply with a court's order is a complete defense to a motion for contempt. *Littlefield v. Town of Adell,* 151 Ga. 684, 694 (1920); *In re Brookins, supra.* at 87.

In the case at bar, the uncontradicted evidence was that Turner no longer owned the sign which was the subject matter of the injunction. Turner was without authority or control to remove or alter the sign in any way. Therefore, Turner was unable to comply with the court's January 11, 1983 order. Despite these facts, the trial court found Turner in contempt. As it was not within Turner's power to comply with the court's order and it was totally unable to do so, the trial court erred in holding Turner in contempt of its January 11, 1983 order.